Greater Wisconsin Agency on Aging Resources, Inc.

The Guardian

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Combined Powers of Attorney for Health Care and Finance

It is important to have both a Power of Attorney for Health Care and a Power of Attorney for Finance. However, each type of document has specific requirements that must be met to be valid under Wisconsin law.

Combined Powers of Attorney (POA) for Health Care and Finance continue to appear and create problems for

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In this Issue:

The Guardian is a quarterly newsletter published by the Greater Wisconsin Agency on Aging Resources, Inc. (GWAAR) Wisconsin Guardianship Support Center (GSC).

The GSC provides information and assistance on issues related to guardianship, protective placement, advance directives, and more.

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*(**Combined POAs,** continued from page 1)*

their principals. Often, an attempt to combine a Power of Attorney for Finance only includes one or two short sentences related to health care decision-making. The Wisconsin state POA for Finance form does not give the agent authority to make health care decisions for the principal. See Wis. Stat. § 244.64 (2015-16). Chapter 244 also does not apply to Powers of Attorney that give the agent authority to make health care decisions (Wis. Stat. § 244.03). A Power of Attorney document executed under current law that gives the agent authority over health care decisions must comply with the requirements in Wis. Stat. ch. 155.

The GSC sees many Powers of Attorney attempting to give an agent authority to make health care decisions that are missing required information. Usually the documents are missing information because the drafter used the requirements only for a Power of Attorney for Finance. For example, the Power of Attorney might only have one witness, instead of the required two witnesses. (Wis. Stat. § 155.10(1)(c)). It might also be missing the required notice statement. (Wis. Stat. § 155.30 (2)). Additionally, Wisconsin has specific requirements for authority to admit to certain types of facilities, to make decisions about withholding or withdrawing a feeding tube, and for making decisions while the principal is pregnant. (Wis. Stat. §§ 155.20(2)-(8)). If the POA document does not specifically give the agent authority to make those decisions, the agent does not have that power.

The Guardianship Support Center has several publications discussing the requirements for a valid Power of Attorney for Health Care and Power of Attorney for Finance.

- Do-It-Yourself Power of Attorney for Finance
- Do-It-Yourself Power of Attorney for Health Care
- Requirements for a Valid POA for Health Care

Careful review of Powers of Attorney might help the individual prevent a guardianship. If it is discovered early enough that the document is invalid for the intended purpose, the principal may be able to make a new document that is valid for the purpose intended. ❒

Training Opportunities for Representative Payees

Many guardians and Power of Attorney agents also act as a representative payee – a person appointed to manage the Social Security benefits for a beneficiary who is unable to do so. The role of representative payee has different requirements, duties, and authority than a Power of Attorney or guardian. Recognizing these differences and the need for education, the Social Security Administration has created a series of training videos to educate representative payees on their roles and responsibilities. The videos currently cover topics including: interdisciplinary training, technical training, recognizing signs of abuse, strategies for interacting with the banking community, and tips on addressing changes in decisional capacity.

The training videos and other information on Social Security's Representative Payee Program can be found at the link below:

https://www.ssa.gov/payee/rp_training2.html ❒

Points of Interest

Spanish Publications

After many inquiries for Spanish language guardianship information, the Guardianship Support Center had two of our publications translated into Spanish:

Guardian of Person: Duties and Powers
Guardian of Estate: Duties and Powers

Would you have a use for any of the other Guardianship Support Center publications translated into Spanish? Please contact guardian@gwaar.org to let us know! ❒

If your organization or agency is hosting a statewide event related to commonly-discussed topics in *The Guardian* and you would like to spread the word about the event, contact the GSC at guardian@gwaar.org. We may include it in our next quarterly publication. ❒

Upcoming Events

National Health Care Decisions Day
April 16—22 National Health Care Decisions Day is a weeklong event this year!

Autism Society of Wisconsin Annual Conference
April 27—29 Kalahari Resort at Wisconsin Dells

Circles of Life Conference
May 4—5 Holiday Inn and Convention Center Stevens Point

Alzheimer's Association 31st Annual State Conference
May 7—9 Kalahari Resort at Wisconsin Dells

Aging Advocacy Day
May 17 Please see last page for more information!

National Adult Protective Services Conference
August 28 – 30 Milwaukee, WI ❒

Case Law

In the Matter of the Guardianship of E.T.

Appeal No.: 2016AP585

Date: March 1, 2017

Case Summary: J.T. (Jennifer) appealed the order dismissing her Petition for Guardianship of the Person and Estate of her mother (E.T.). She argued that the circuit court should have revoked or limited the Powers of Attorney (POAs) because her mother executed conflicting Powers of Attorney, and the circuit court failed to see that appointing a guardian was in E.T.'s best interest. The WI Court of Appeals for District II affirmed the order dismissing the Petition for Guardianship.

Case Details:

E.T. has four children: Rebecca, Kenneth, Jennifer, and Kathryn. When E.T.'s mental capacity began to decline,

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(*Guardianship of ET,* continued from page 3)

the siblings disagreed on her care and where she should live. In June 2015, E.T.'s physician activated her 2012 Power of Attorney for Health Care, which named Rebecca as her POA agent. Rebecca moved her mother into a Community Based Residential Facility. E.T. was then transferred to the memory care unit. Soon after, Jennifer petitioned for Kathryn to be appointed the permanent guardian of E.T.

E.T. executed multiple POAs between 2009 and 2012. On March 10, 2009, she signed two: the first named Rebecca as primary financial agent and Kenneth as alternate, and the second named Kenneth as primary financial agent and Rebecca as alternate. In February 2010, she signed a POA naming Kathryn as health care agent and Jennifer as alternate. In October 2012, E.T. revoked her 2010 POA for Health Care and executed a new one naming Rebecca as primary health care agent and Kenneth as alternate.

The circuit court heard testimony from several witnesses. The psychologist testified that E.T. needed a guardian and was permanently incapacitated. The psychiatrist, advocacy counsel, and guardian ad litem explained to the court that E.T. consistently expressed her desire for Rebecca to continue making her decisions as POA agent, and that she was happy and receiving appropriate care.

The circuit court dismissed the Petition for Guardianship. It found that Jennifer failed to meet her burden of proving that the guardianship was necessary because 1) the arrangement reflected the financial and health care designations that E.T. made while competent, and 2) it continued to meet her needs. Jennifer appealed.

The Court of Appeals found that Jennifer did not prove that the circuit court's findings were clearly erroneous or that a guardianship was in her mother's best interest. The Court of Appeals agreed with the circuit court's findings including: 1) Jennifer did not provide any evidence to support her allegations of abuse; 2) the GAL's opinion that the guardianship was unnecessary should be given great weight; 3) E.T. consistently expressed her opinion of whom she wanted to be in charge; and 4) ET clearly engaged in advanced planning. The Court of Appeals affirmed the circuit court order dismissing the Petition for Guardianship. ❐

Disclaimer

This newsletter contains general legal information. It does not contain and is not meant to provide legal advice. Each situation is different and this newsletter may not address the legal issues affecting your situation. If you have a specific legal question or want legal advice, you may want to speak with an attorney.

City of Madison v. State of Wisconsin Dept. of Health Services

Appeal No.: 2016AP727

Date: March 9, 2017

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(*City of Madison v. State of WI DHS*, continued from page 4)

Case Summary:
The City of Madison filed for declaratory and injunctive relief against the State of Wisconsin Department of Health Services alleging that the Department acted outside of its authority by refusing to accept custody of individuals for emergency detention and treatment at Mendota Mental Health Institute in Madison. The circuit court dismissed the complaint concluding the Department had not exceeded its authority because it designated at least one state treatment facility (Winnebago Mental Health Institute in Oshkosh) to accept individuals transported for emergency detention and treatment. The City of Madison appealed.

Case Details:
The City of Madison argued that under Wis. Stat. § 51.15(2), the Department of Health Services did not have authority to designate Winnebago as the only state treatment facility available to accept individuals transported for an emergency detention and treatment.

Wis. Stat. § 51.15(2) states, "Detention may only be in a treatment facility approved by the Department or the county department, if the facility agrees to detain the individual, or a state treatment facility."

The City argued per Wis. Stat. § 51.15(2), individuals being transported for emergency detention and treatment can be transported to any of the state treatment facilities.

The parties explained that in practice a state treatment facility is used for emergency detention and treatment when there is not a local approved treatment facility available to accept the individual.

The City argued that the word "a" within the phrase "*a* state treatment facility" means that the Department must accept custody at *any* of the state treatment facilities. The Department argued "*a* state treatment facility" means "whichever state treatment facilities it designates, so long as it designates at least one."

The Court of Appeals of Wisconsin, District IV, agreed with the Department explaining that the Department already has the authority to designate the functions of state treatment facilities under Wis. Stat. § 46.03(1). The Court of Appeals stated that it would be unreasonable to conclude that the legislature intended to force the Department to ensure emergency detention and treatment was available at all state treatment facilities when other statutes allow the Department discretion to organize the state treatment facilities to provide a uniform system of resources for treatment.

The Court of Appeals concluded that the intent of Wis. Stat. § 51.15(2), read in context with related statutes, allows the Department to designate which treatment facilities will accept individuals for emergency detention and treatment so long as at least one of the state treatment facilities is designated for that purpose. ❒

In re the Commitment of David Hager, Jr.
Appeal No.: 2015AP330
Date: January 24, 2017

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(*Commitment of David Hager, Jr.,* continued from page 5)

Case Summary: Hager appealed the orders denying his petition for discharge from a Wis. Stat. Ch. 980 commitment without trial and denying his motion for reconsideration. Hager argued the court misinterpreted a change to Wis. Stat. §§ 980.09(1) and (2) from 2013 which directs the court to decide whether the petitioner should receive a discharge trial. The burden increased to "would likely conclude" from "may conclude." The court found that the changes to Wis. Stat. § 980.09(2) in 2013 did not permit the court to "weigh the evidence favorable to the petition against the evidence unfavorable to it." With this finding, the court concluded that the circuit court erred as a matter of law by failing to set the issue of Hager's discharge for trial.

Case Details:
In 1995, Hager was convicted of three counts of incest with a child and in 2008 he was committed as a sexually violent person. Hager had previously filed petitions for discharge, but the one in question was filed in 2013 and amended in 2014. The 2014 petition for discharge was supported by the psychologist's reexamination report, where she reported Hager's risk for reoffending was below the level of risk required for a Wis. Stat. Ch. 980 commitment. She assessed Hager's re-offense risk using two actuarial instruments that were not used during the initial commitment.

The State argued the court should deny Hager's petition without holding a discharge trial. The State claimed the changes made to Wis. Stat. Ch. 980 in 2013 had changed the standard for whether a discharge petition warrants a discharge trial.

The wording in Wis. Stat. §§ 980.09(1) and (2) changed from "may conclude" to "would likely conclude" in terms of the facts from which the factfinder would consider when determining if the person's condition changed.

The State argued the new language requires the court to weigh the evidence in support and in opposition to the petition. The circuit court accepted the State's argument, and denied the petition without hearing. The circuit court also denied Hager's motion for reconsideration. Hager appealed.

In 2006 the legislature created a two-step process:

Step 1: Review whether the facts alleged are those from which a jury may conclude (now, *would likely conclude*) the person's condition has changed since the date of the initial commitment so that the person no longer meets the commitment criteria.

Step 2: The court could hold a separate hearing on the issue of whether the records contain facts that could support relief for the petitioner at a discharge hearing.

Previously during the record review the court was not permitted to weigh evidence favoring the petitioner directly against evidence disfavoring the petitioner. Where before a mere possibility of success was sufficient, a petitioner now must demonstrate a reasonable likelihood of success to obtain a discharge trial.

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1) The state Power of Attorney forms do not provide enough room to include my special instructions. Can I add an addendum to the state form?

Yes, an addendum or attachment can be added to the state forms. Any attachment should be referenced in the main document and witnessed on the same date and in the same manner as the main document.

The state POA forms include a blank space for principals to include any additional statements or clarifications of their wishes or instructions. The blank space is sometimes not enough room to include everything. Individuals who want to use the state forms but find they do not have enough room for their additional information can include an addendum to the POA document.

The statutes do not prohibit attaching an addendum to the state forms. It is important to create an attachment that is clearly part of the original POA document. Best practice would be to include reference to the addendum within the body of the main POA document. In the blank space provided for additional instructions a phrase similar to "see attached addendum" including a date and/or title of the addendum would refer a reader to the correct place.

In addition, the same signing and dating method used in the main POA should be used on the addendum. For example, the witnesses who witness the signing and dating of the main form would witness the signing and dating of the addendum at the same time. Ensuring that the addendum and main POA document have the same dating and witnessing could help avoid questions of the validity of the addendum.

The law is silent on whether amendments to a POA would be valid. It is not recommended to add an addendum with substantial instructions or information after the POA is executed. If the principal wants to make a change to a previously executed POA document, he/she can execute a new POA instead of making changes to the previous document.

2) Can adult children create Powers of Attorney documents for their parents?

No! This question usually accompanies a situation where the parent has had a health crisis and is no longer able to make their own decisions. The adult children, usually meaning well, attempt to create a Power of Attorney document to give themselves authority to make decisions on behalf of their parent. However, a Power of Attorney created without involving the principal is invalid.

3) Can a standby guardian make decisions at the same time as the primary guardian?

No. A standby guardian does not have authority to make decisions when the primary guardian is able and willing to do so. An arrangement where two guardians have authority at the same time, over the same areas, is called co-guardianship. A standby

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Helpline Highlights

(*Standby Guardian,* continued from page 7)

guardian is appointed to assume the authority and responsibilities of guardian if the primary guardian becomes incapacitated, dies, resigns, is removed by the court, or is otherwise unwilling or unable to act. When the standby guardian takes over the court is to issue new letters of guardianship indicating that the standby guardian is taking over permanently or for a specified period of time. ❒

Do you know someone who would like to receive the *Guardian* newsletter? Do you want more information about guardianship and related issues? Signing up is easy with the link on the Guardianship Support Center website: Guardian Newsletter Sign Up. You can also subscribe by emailing your name, email address and organization to teresa.bull@gwaar.org. ❒

Case Law

(*Commitment of David Hager, Jr.,* continued from page 6)

Hager argued the new standard does not suggest any balancing or weighing of evidence. The Court of Appeals agreed with Hager stating that "the increase in the pleading standard does not clearly signal the legislature's intent to adopt a 'weighing' procedure during a Wis. Stat. § 980.09(2) review." The Court of Appeals found that the new wording requires the court to determine whether the facts in the record that are favorable to the petitioner create a reasonable likelihood of success at a discharge trial.

Using this interpretation of the statute while reviewing Hager's discharge petition, the Court of Appeals concluded the petition and facts of record were sufficient to warrant a discharge trial. ❒

You're Invited to

Aging Advocacy Day!

May 17, 2017, Madison, WI

9:00 a.m.— 3:00 p.m.
Capitol Lakes Retirement Community & State Capitol

Join other advocates and help educate state legislators about issues affecting Wisconsin's aging population! No experience is necessary; you'll get the training and support you need before meeting with state lawmakers.

Wisconsin has a long, proud history of grassroots advocacy on the part of older people in the state. Become a part of the citizen-led initiatives that have made Wisconsin's aging programs some of the best in the nation!

Your voice can make a difference!

For more information or to register, visit http://gwaar.org/waan or contact your local aging unit or ADRC. Registration deadline is May 1, 2017.

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